

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 75-7648

## United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7648

In the Matter of

WEIS SECURITIES, INC.,  
*Debtor.*

STOCK CLEARING CORPORATION, INC.,  
*Plaintiff-Appellant,*  
*—against—*

WEIS SECURITIES, INC., and EDWARD S. REDINGTON,  
as Trustee of Weis Securities, Inc.,  
*Defendants-Appellees.*

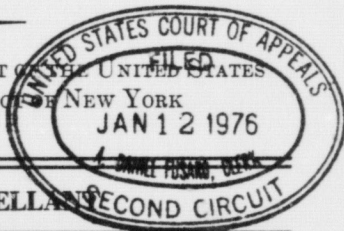
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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## BRIEF OF APPELLANT

### Preliminary Statement

On May 24, 1973, plaintiff-appellant Stock Clearing Corporation Inc. ("SCC") delivered certain securities to defendant Weis Securities, Inc. ("Weis") for which it was not paid. On the same day (at 12:42 p.m.), the Securities and Exchange Commission commenced liquidation proceedings against Weis under the Securities Investor Protection Act. Thereafter, SCC instituted reclamation proceedings against Weis and its Trustee to recover the securities delivered to it on the ground that the same had been delivered to Weis on condition that they be paid for in cash and that Weis' failure to pay precluded those securities from passing into Weis' bankruptcy estate.

On June 13, 1975, the Bankruptcy Court (per Babitt, J.) dismissed SCC's complaint in reclamation and, on appeal below, the District Court (per Wyatt, J.) in its October 28, 1975 decision—on grounds different from those relied upon by the Bankruptcy Court—affirmed that dismissal.\*

### Question Presented

In affirming dismissal of SCC's reclamation complaint on the grounds that SCC intended to deliver securities to Weis on credit, did the District Court err:

- a. in disregarding the unambiguous terms of the contract between SCC and Weis which provided for delivery against payment in cash? and,
- b. in resolving the disputed issue of the parties' intent in the transaction without a hearing or full factual record on that issue?

### Statement of the Case

#### A. *Nature of the Case, Course of Proceedings and Disposition*

SCC is a clearing corporation which provides facilities for clearing and settling securities transactions among SCC's members. On May 24, 1973, the day on which liquidation proceedings were commenced against Weis, Weis was a broker-dealer and member in good standing of SCC utilizing its services.

During that day, SCC delivered securities to Weis, for which Weis was obligated to pay \$1,135,459.87.\*\* Weis' check in payment delivered on the afternoon of May 24 was dishonored.

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\* Neither decision is reported. Both will be reproduced in full in the Joint Appendix to be filed on this appeal, preparation of which has been deferred pursuant to Fed. R. App. Pro. 30(c).

\*\* Of the \$1,135,459.87, \$61,300 were securities actually delivered after the liquidation proceedings were commenced at 12:42 p.m. (Stipulation of Facts ¶10, see Ex. D thereto, No. 1).

On June 15, 1973, SCC moved the Bankruptcy Court, which was then supervising and continues to supervise the Weis liquidation, for an order barring disposition of the securities SCC delivered to Weis, pending a determination of SCC's right to reclaim them for nonpayment. At the hearing on that motion, the Trustee compromised the issue by suggesting that an escrow fund be established in place of the securities.

The hearing was adjourned and the parties entered into a stipulation, creating the agreed-upon escrow fund in the amount of \$1,135,459.87 (the "Fund"), which was approved by the Court on July 3, 1973. The stipulation provided that the creation of the Fund was without prejudice to SCC's asserted reclamation right in the unpaid-for securities and that any such right would attach to the Fund.

On May 20, 1974, SCC commenced this reclamation action in the Bankruptcy Court against Weis and the Trustee to recover the full amount of the Fund.

SCC argued to the Bankruptcy Court that since the agreement between SCC and Weis, on its face, provided for delivery of securities to Weis against payment in cash, SCC was entitled—as a matter of law—to reclaim them when Weis did not fulfill its part of the contract and failed to make payment. SCC also argued that it was likewise clear from the face of the agreement that it had standing to reclaim because it had paid for the securities pursuant to Rule 7 and because it was a bailee of those securities.

The Trustee contended that it could not be determined from SCC Rule 7 what role SCC plays in settlement transactions or whether the disputed transaction was for cash or credit. He claimed that those issues could only be resolved by determining the intent of the parties to the contract. Thus, the Trustee did not focus on SCC Rule 7 but instead pointed to other rules of SCC, noting that each of them had terms in common with those found in loan agreements.



Relying on legal argumentation to establish the factual proposition of the intent of the parties, the Trustee advanced no facts in support of his contention about the purpose of SCC Rule 7 or any other rule. Indeed, he was incapable of doing so, since the stipulation of facts—the only record in this case—includes neither evidence nor competent, relevant testimony on the purpose, intent or reason for any of SCC's rules or its settlement procedures.

Nonetheless, the Trustee concluded that SCC's intent under the circumstances of this case must have been to extend credit to Weis. Thus, the Trustee urged the Bankruptcy Court to dismiss SCC's complaint in reclamation, deem the securities which were delivered to be part of Weis' bankruptcy estate and treat SCC as a general creditor entitled only to share in the distribution of that estate.

The Bankruptcy Court never reached the question whether the transaction was for cash or credit. Instead, in its June 13, 1975 decision, the Court dismissed the complaint on the ground that SCC assertedly had no standing to sue because it was a clearing corporation and not the "owner" of the securities delivered to Weis.

On appeal to the District Court, SCC argued that the Bankruptcy Court had erred in refusing to acknowledge its standing. SCC again urged that its Rule 7 governed the dispute and that judgment as a matter of law should be entered in its favor. The Trustee reiterated the same arguments he made below.

In its October 28, 1975 decision, the District Court affirmed the dismissal of SCC's reclamation complaint. However, in contrast to the Bankruptcy Court, the District Court directed its attention to the merits of the case and squarely held that the intent of the parties must have been to engage in a credit transaction.

#### ***B. Facts Not in Dispute***

After some preliminary discovery, the parties entered into a stipulation (the "Stipulation") concerning the basic

facts of the subject transaction: the clearing agreement between SCC and Weis; the rules of SCC to which Weis was bound under the clearing agreement; and, the essential events that transpired on May 24, 1973, as well as an accounting of the securities delivered to Weis for which Weis failed to pay. The Stipulation also included deposition testimony primarily relating to the operational aspects of SCC's clearance and settlement procedures.

The Stipulation illustrates that SCC is a clearing corporation designed to permit brokers who are members to settle all their securities transactions at the same time. Prior to the advent of SCC, a broker was required to settle each transaction individually, delivering stock to each broker. In contrast, under the SCC system, the broker delivers securities for all his transactions to SCC for pick-up by the appropriate brokers.

Since its inception, SCC has had a set of rules to which each member must agree. Rule 6 regulates the procedures to be used by member-brokers for the delivery of securities and Rule 7 governs payment.

Prior to 11:30 a.m. each business day, brokers deliver to SCC securities relating to each sales transaction, marking on the envelope the name of the recipient broker and the value of the securities enclosed. Stipulation of Facts ¶ 5, SCC Rule 6, §§1(1), 1(3), 1(4). Purchasing brokers pick up the envelopes before 11:30 a.m. Stipulation of Facts ¶ 5, SCC Rule 6, §§1(8), 1(9). SCC's function is to make sure that the envelopes are given to the proper recipients, being members of SCC who are bound by its rules. SCC does not look inside the envelopes to verify the contents; it merely notes in its books the dollar amount indicated on the envelope. Stipulation of Facts ¶ 5, SCC Rule 6, §§1(5), 1(6).

The broker, after receiving envelopes marked for him, inspects the contents to verify that the securities which are

enclosed are, in fact, the ones he ordered. He also verifies the dollar amount on the envelopes and that the securities are in good form for delivery. If there is any discrepancy, he may return the securities to SCC prior to 2:00 p.m. Stipulation of Facts ¶ 5, SCC Rule 6 §§1(1), 1(9).

Invariably, there will be differences in the value of securities a broker sells and purchases on a given day. The broker calculates the difference prior to 3:00 p.m. If the value of securities sold by a broker exceeds the value of those purchased, money would be due him. This would be reflected pursuant to Rule 7 by a "net credit balance" in SCC's books. On the other hand, if the value of securities the broker purchased exceeds the value of those sold, he would owe money. This would be reflected by a "net debit balance" in SCC's books. Under Rule 7, the broker is required to draw a check to SCC for any net debit balance and to deliver it to SCC prior to 3:00 p.m.; SCC does the reverse if there is a net credit balance due the broker.\*

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\*Rule 7, in pertinent part, provides:

If at the close of any business day, a balance is due the Corporation from a Settling Member, a check on a bank or trust company in the vicinity of the Exchange, payable through the New York Clearing House Association, drawn to the order of Stock Clearing Corporation for the amount of such balance shall be delivered to the Corporation at the Settlement Department before 3 P.M. on business days. The check shall be certified if for \$5,000 or over, unless it is the check of a bank which is a Non-Member Bank, or unless certification is waived by the corporation in its discretion. If the check is in payment of a balance due by a Clearing Member, or Non-Clearing Member, it shall be a check of a member organization of the Exchange.

If at the close of any business day a balance is due a Settling Member by the Corporation, a memorandum of such balance in such form as the Corporation shall require shall be presented to the Corporation before 3 P.M. on business days. The Corporation shall make available to the Settling Member its check for the amount of such balance at the Settlement Department not later than 3 P.M. on business days.



Following this procedure and in accordance with SCC Rule 6, on May 24, 1973, Weis delivered to SCC securities having a value of \$782,928.59 and received securities having a value of \$1,909,093.66. Stipulation of Facts ¶¶ 8, 9. The amount owed for securities delivered, reflected on SCC's books as a net debit balance, was \$1,135,459.87. Stipulation of Facts ¶ 14. Pursuant to SCC Rule 7, Weis made out a check in that amount to SCC, which had already made appropriate payments to brokers for securities delivered to Weis. See Stipulation of Facts ¶¶ 7, 14. The Weis check was deposited but dishonored. Stipulation of Facts ¶ 15.

### Summary of Argument

While the dispute in this case arises in the context of a bankruptcy proceeding and involves the bankruptcy remedy of reclamation, the issue at hand is one of simple contract law. The parties here disagree as to the meaning of the clearing agreement between them. In short, elementary principles of contract interpretation govern.

Relying solely on the language of that contract and the stipulated record as to SCC's settlement procedures, SCC moved below for summary judgment, presenting to the Bankruptcy Court a pure question of law: whether SCC was entitled to reclamation on grounds that Rule 7 (the payment term of the contract between it and Weis) in providing for delivery against payment in cash unambiguously expressed the intent that settlements between SCC and its members be cash transactions.

The Bankruptcy Court, however, dismissed SCC's petition, holding that it had no standing to sue because it was not the owner of the securities it sought to reclaim. What that Court overlooked is that SCC's standing to reclaim the securities delivered to Weis was evident from the role SCC plays in the typical settlement transaction: it pays for the securities delivered to it for pick-up by brokers and, hence, is subrogated to the rights of the original owners; it

is likewise a bailee of the securities left with it for pick-up. Thus, SCC had standing both as a subrogee and a bailee.

Moreover, if the Bankruptcy Court could not determine from the clearing agreement the exact role in settlement transactions SCC was intended to play, then it was required, as a matter of law, to deny SCC's motion—or hold it in abeyance—and direct that a hearing be held on SCC's standing.

SCC's petition having been dismissed by the Bankruptcy Court for lack of standing, the District Court was presented, on appeal, with two questions of law: (a) whether SCC's standing to sue could be discerned, as a matter of law, from its role in the transaction; and, (b) whether the contract was so unambiguous in providing for a cash transaction as to entitle SCC to judgment and reclamation of its securities.

The District Court, declining to follow the lead of the Bankruptcy Court, focused on the merits of the parties' dispute—whether the subject transaction was for cash or for credit. Instead of deciding the questions of law before it—governed by SCC Rule 7—the Court apparently assumed that SCC Rule 7 was ambiguous and attempted to discern what the parties had in fact intended. This was error.

The District Court clearly lost sight of what this Court most recently termed, in *Heyman v. Commerce and Indus. Ins. Co.*, Dkt. No. 75-7230 (2d Cir., Oct. 24, 1975), a “fundamental maxim” that: “. . . on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried.” Slip Op. at 279

No doubt the District Court was led astray by the Trustee's position, in effect a cross-motion for summary judgment, which invited speculation as to the intent underlying SCC's rules and procedures for settlement. The District Court, erroneously relying on the presence of a stipulated record as indicative that no factual dispute existed, instead of rejecting SCC's legal position and re-

manding for a hearing on the intent and purpose of SCC's rules, found that the clearing agreement between SCC and its members must have contemplated a credit transaction. This finding was without benefit of a full record, without relevant testimony and without even a finding of fact by the Court of first impression.

## ARGUMENT

### I.

**Since SCC Rule 7 On Its Face Provides For Delivery of Securities Against Payment In Cash, Weis' Failure To Make Such Payment Entitled SCC To Reclaim Its Securities.**

**A. SCC Presented a Pure Question of Law To The Courts Below: The Interpretation of An Unambiguous Provision of a Contract—Rule 7**

The provision which governs the transaction at issue in this case and the attendant dispute is SCC Rule 7, to which Weis, as a member of SCC, specifically agreed. Stipulation, ¶¶ 2, 3, Exh. A. Under SCC Rule 7, each broker which is a member of SCC daily determines whether it has a net debit or a net credit balance. If there is a net credit due a member, SCC is required to give its check for the amount a member has determined to be owing no later than 3:00 p.m. If, on the other hand, there is a net debit due SCC, the member is required to draw a check payable through the New York Clearing House, have it certified and present it on or before 3:00 p.m.\* In brief, Rule 7 provides for a simple procedure whereby cash balances due are remitted to the proper recipient, when settlement of all transactions is completed.

The issue raised by SCC's unsuccessful motion for summary judgment in the Bankruptcy Court (which is still

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\*The check need not be certified if the amount due is less than \$5,000 or if SCC determines otherwise in the exercise of its discretion.

undecided), is a simple question of law to be resolved solely by reference to SCC Rule 7. The question presented was whether SCC Rule 7 unequivocally expressed an agreement between the parties that settlements will be made for cash.

That legal issue was properly addressed to the Bankruptcy Court since, in a case such as this, it is for a Court to decide as a matter of law whether the disputed term (e.g., Rule 7) is unambiguous or is susceptible of only one reasonable interpretation. *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 233 (2d Cir. 1971); see *Heyman v. Commerce and Indus. Ins. Co.*, Dkt. No. 75-7230 (2d Cir., Oct. 24, 1975), slip op. at 280. If the Court so finds, it may dispense with inquiry into either the intent of the parties, the circumstances of the making of the agreement or the purpose of the subject transaction. Indeed, to vary the terms of an unambiguous written instrument by reference to intent or other extrinsic matter would be error.

**B. The Courts Below Erred In Going Beyond That Rule And In Attempting to Discern Whether Settlement Transactions Are Intended By The Parties To Be Extensions of Credit**

Despite the fact that the legal issue raised by SCC's motion is the threshold question in any contract case, the Bankruptcy Court avoided the question and the District Court did not specifically address it; rather, the District Court appears to have taken for granted that SCC Rule 7 was ambiguous. However, having assumed the rule to be ambiguous, as a matter of law, the only proper disposition by the District Court was an order directing that a factual hearing be held. As this Court stated in *Spencer, White & Prentiss Inc. v. Pfizer Inc.*, 498 F.2d 358, 363-64 (2d Cir. 1974):

"While the meaning of an unambiguous contract is a question of law, the meaning of an ambiguous one presents a question of fact on which resort may be had to

extrinsic aids of construction throwing light upon the intent of the parties. The intent of the parties to an ambiguous contract is a question of fact which cannot be resolved on summary judgment."

The District Court, giving scant attention to the contract language at the heart of this case, turned to the fact question which was neither before it, nor within its province to decide, and determined—without benefit of a record directed to the issue of the meaning, purpose and intention underlying SCC Rule 7—that the settlement procedures of SCC had some unspecified credit characteristics reminiscent of day loans that are extended by commercial banks.

But there is simply nothing in the record or on the face of Rule 7 which could even suggest a credit transaction. The Rule does not mention the term "loan" or "day loan" and makes no provision for interest to compensate SCC for any extension of credit.

The District Court sought justification for its finding of fact on the basis of the following observations which the Court appears to have inferred from the stipulated record:

(1) "SCC was not dealing with strangers, with members of the general public. It was dealing with members of NYSE [New York Stock Exchange] whose financial condition was being monitored by that institution."

(2) "All members were permitted to take away securities at any time of the day between 8 and 11:30 a.m., without regard to their debit balance."

(3) "No restrictions were placed on the use to be made of securities taken away, on which a debit balance was owed."

(4) "Any debit balance would not be due until 3 p.m."



Even if it had been proper for the District Court to consider these points, it is clear that they could not support the decision reached; they are equivocal at best and could just as easily support a finding that the parties intended settlements be cash transactions.

Thus, for example, the purpose and nature of SCC's settlement procedures is in no way revealed by a mere reference to the New York Stock Exchange's Congressionally-imposed duty of self-regulation under the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*), requiring the Exchange—as opposed to SCC—to monitor member organizations for the protection of the investing public.

Of the three other points cited by the District Court, the second and the fourth are mere references to the settlement procedures provided for in Rules 6 and 7; the third is an inference from the *absence* of a rule. All appear to relate to the fact that payment for securities is not made contemporaneously with the pick-up of securities by the purchasing brokers—i.e., SCC members can withdraw securities prior to 3:00 p.m. when debit balances must be paid. The delay between pick-up and payment which is countenanced by the Rules is clearly necessitated by the fact that members must verify securities received, compare the total received with the value of securities delivered to SCC for clearance and settlement, make certain that securities received are in proper form for redelivery and calculate the amount of any debit or credit balance which is due.

And, the cases have uniformly held that the *mere fact* the payment is delayed, and does not occur simultaneously with delivery, neither makes a transaction one for credit nor indicates an intention to extend credit.

For example, in the recent case of *In re Samuels*, 510 F.2d 139 (5th Cir. 1975), sellers delivered cattle to a packing house, which subsequently slaughtered and graded them and determined the amount due. When the packing house went bankrupt, the cattle sellers, who were unpaid, sued to reclaim the proceeds of the slaughtered animals.

Under the best of circumstances, the cattle sellers could not have been paid in less than a day because of a regulation requiring that the meat be chilled. In addition, 11 days had elapsed between the first delivery and the packer's bankruptcy. In granting a reclamation petition, the Fifth Circuit dismissed the argument that the delay in payment converted the transaction into a credit sale.

*In re Smithdale Indus.*, 219 F.Supp. 862 (E.D. Tenn. 1963), is to the same effect. The question there was once again whether the seller's delivery of goods to the buyer without getting immediate payment made the transaction one for credit. In rejecting this contention, the Court stated:

"Neither did the seller's leaving [the goods on the buyer's] premises without payment convert this cash sale into a credit transaction... This being a cash transaction, the fact that [the buyer], for its own convenience, delayed remittance for a few days does not change the legal effect of the sale." 219 F.Supp. at 864-65.

Accord, *Engstrom v. Wiley*, 191 F.2d 684, 687 (9th Cir. 1951) ("The mere fact that . . . there was any delay [between delivery and payment] . . . is of no significance . . ."). See also *In re Perpall*, 271 Fed. 466 (2d Cir. 1921).

Perhaps this point is best illustrated by *In re Perpall*, 256 Fed. 758 (2d Cir. 1919). There, the messenger of a seller delivered a bond to a broker. Since the broker was required to check the bond and to make appropriate book entries, the messenger left momentarily. When he returned, he was paid by a check which was subsequently dishonored due to the broker's financial difficulties. In a reclamation proceeding against the trustee, this Court held that judgment was properly awarded the claimant because the disputed transaction was for cash, not credit. This Court observed that the delay between delivery and payment did not make the transaction one for credit, since the delay was

necessitated by the fact that the broker had to make a comparison of the security with its order, appropriate book entries and draw its check for the proper amount.

Rule 7, of course, contemplates the same procedure. Settlement (payment) must be made by 3:00 p.m. in the afternoon in order to allow brokers the opportunity to compare securities received by them during the day with orders on their books and to determine whether the securities are in proper form. During this time, brokers must also add the value of securities delivered out and received by them, calculating the net amount they must pay SCC or the net amount due SCC.

The purpose of the whole procedure is obviously to eliminate the necessity of settling each individual sales transaction. The SCC mechanism permits brokers to aggregate the purchase and sale of securities. Thus, instead of settling each transaction individually, as in *Perpall*, brokers under Rule 7 remit or receive payment depending on whether there is a net balance in their account.

In sum, none of the grounds cited by the District Court supported its attempted finding of fact or disposed of the issue that the District Court believed was before it on appeal: the intent underlying SCC's rules. The District Court was bound by the unequivocal language of SCC Rule 7 and should not have gone beyond it.

## II.

**If SCC Rule 7 Is Not. As A Matter of Law, Unambiguous, The Courts Below Were Barred From Drawing Inferences About SCC and The Transaction Without the Benefit of a Full Factual Record On The Parties' Intent.**

The transaction in *Perpall*, of course, was not subject to a clearing system such as SCC. Thus, in that case, there existed no contract which the Court could interpret as a matter of law. SCC Rule 7 would now appear to permit



such a legal conclusion. However, if the District Court believed—as it apparently did—that Rule 7 was so ambiguous as to preclude judgment for SCC as a matter of law, the Court was bound by well settled principles of contract interpretation to inquire into the intent of the parties.

As this Court stated in *Perpall*, “where a contract... does not provide, in express terms, that payment shall be made on delivery... the intent of the parties must control... the question of intent in such case is one of fact.” (emphasis added) 256 Fed. at 759. This rule has been uniformly followed. In *Bostian v. Levich*, 134 F.2d 284 (8th Cir. 1943), the court was faced with the question whether the exchange of checks constituted cash or credit transactions. The Eighth Circuit, in affirming the findings of the lower Court, stated:

“[T]he purpose of the parties in making the check exchanges and their significance as cash or credit transactions, were, in the situation here, fundamentally questions of fact and not merely of law.” 134 F.2d at 286

Similarly, *In re Helms Veneer Corp.*, 287 F.Supp. 840 (W.D.Va. 1968), raised the question whether two ostensibly similar transactions for the sale of goods to a bankrupt were for cash or for credit. The Court, after hearing testimony, found that in one transaction the seller had released goods to the bankrupt “on a promise of payment in the future”, thus denying reclamation. However, on the basis of other testimony relating to a second transaction, the court found that it was for cash. In so holding, the Court noted the failure of the trustee to adduce testimony to controvert the claimant’s petition. Said the Court:

“The record before this court reveals nothing... to indicate that the parties meant to deviate from the normal cash basis that is the custom of the trade. The customs and habits plus the intention of the parties are

governing factors in determining whether there has been a cash transaction." 287 F.Supp at 844

When the Court below determined Rule 7 was not dispositive, it was barred as a matter of law from going any further on the limited record before it— a record sufficient only for the purposes of SCC's summary judgment motion.\*

The record below contained no testimony by those individuals responsible for drafting and enforcing SCC's rules. Likewise, there was no testimony from the appropriate officers of Weis who were responsible for compliance with SCC rules. Similarly, except to the extent codified in SCC rules, there was no competent and qualified testimony or evidence on custom and usage in the industry. The record also lacks testimony by all the participants in the events of May 24, 1973 that led up to the present dispute. In short, while the stipulation was ample for the purpose intended— summary adjudication of SCC's claim, based on the contractual content of Rule 7, it did not and could not substitute for the trial which should have followed once SCC's motion failed.

The District Court, however, did not remand because it apparently drew the erroneous conclusion that since there was a stipulated record and the parties had cross-moved for summary judgment, no issues of fact remained to be tried—even though the intent of the parties was obviously very much in dispute.

In so doing, the District Court violated "[t]he well-settled rule . . . that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a

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\* Likewise, if the Courts below believed that SCC's standing to reclaim was not clear from its payment for the securities pursuant to Rule 7, or its position as a bailee, they were also barred from disposing of the question on the limited record available.

matter of law upon facts that are not genuinely disputed." *Heyman v. Commerce and Indus. Ins. Co.*, *supra*, slip op. at 281.

Relevant authorities required the District Court to direct a hearing on the ambiguities which it had found so that specific findings of fact could have been made with respect to the SCC's role in settlements and the intent of the parties to such transaction—parties which include not merely those involved in this litigation but indeed all the other members of SCC affected by this decision.

### III.

**In Any Event, the Courts Below Overlooked The Fact That Under The Securities Investor Protection Act, SCC Is At Least Entitled to Reclaim \$61,300 of The Securities Delivered to Weis.**

At 12:42 p.m. on May 24, 1973, the SEC, under the Securities Investor Protection Act ("SIPA"), commenced liquidation proceedings against Weis by filing a petition in the Bankruptcy Court. After that filing, SCC delivered to Weis securities having a value of \$61,300. SCC is entitled to reclaim this amount on the authority of *SEC v. John E. Samuel & Co.*, [1972-73 Trans. Binder] CCH Fed. Sec. L.Rep. ¶ 93,720 (S.D.N.Y. 1973), a case directly in point.

In *Samuel*, seven brokers delivered stock to a brokerage house after the commencement of SIPA proceedings. Not having been paid, they sued the trustee to reclaim the securities. In granting the petition for reclamation, the Court pointed out that a SIPA trustee takes title to all property held by the bankrupt *as of the time of filing the petition*. (15 U.S.C. § 78fff(b)(1) and 11 U.S.C. § 110(a)) The Court concluded that since the bankrupt broker had no right to securities delivered after liquidation, the trustee could succeed to none.

*Samuel* dictates that SCC reclaim from the escrow fund the sum of \$61,300, representing those securities delivered to the Trustee after the filing of the SIPA petition, and to which neither Weis nor the Trustee are entitled.

### CONCLUSION

For all of the foregoing reasons, this Court should reverse the erroneous judgments of the Courts below and remand, directing either that judgment be entered in favor of SCC and against Weis and the Trustee or that a trial be held on the disputed issues of contract interpretation in this case.

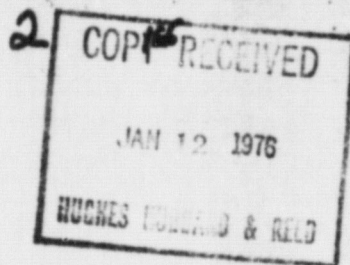
Respectfully Submitted,

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OK as proof of service  
J Brasen 2-13-76